PP

v.

DATO' HJ AZMAN MAHALAN

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: A-06B-3-07]
28 JANUARY 2010

CRIMINAL LAW: *Anti-Corruption Act 1997 - Section 10(b)(aa) - Corruptly having given gratification - Appeal against acquittal - Whether direct evidence of corrupt payment shown - Whether complainant an accomplice - Whether High Court judge erred in ordering acquittal - Whether charge proven beyond reasonable doubt*

EVIDENCE: *Accomplice - Corruption case - Respondent charged under Anti-Corruption Act 1997, s. 10(b)(aa)- Whether complainant an accomplice just because he received bribe money - Complainant alerted ACA before commission of offence - Complainant handed over bribe money to ACA - Complainant not an accomplice - Corroboration not required - Anti-Corruption Act 1997, s. 44*

EVIDENCE: *Witness - Prosecution's failure to call witness - Material witness - Corruption case - Failure by prosecution to call person who allegedly witnessed payment of corruption money - Whether fatal to prosecution's case - Whether adverse inference to be drawn against prosecution*

The respondent in this case was charged with two counts of corruption under the provisions of the Anti-Corruption Act 1997 ('the Act'). The facts were that, on 5 April 2001, SP1 had obtained a bankruptcy order against SP6 due to non-payment of a balance of RM90,000 by the latter. On 6 April 2001, SP1 and SP6 went to the official assignees' office (OA) to settle the matter, eventuating with the indebted sum reduced to RM20,000. While discussing with SP6 at the OA, SP3 and SP10 separately telephoned SP1 requesting him not to settle the matter with SP6, and to meet the respondent later. The effect of that non-settlement was that SP6 would remain a bankrupt, thereby disabling him from standing for election as head

of the Tapah UMNO branch. The respondent was to be the other serious contender for the same post. In any case, SP1 replied that he would think about it. SP1 then realized that there was a move to corrupt him and so contacted the ACA. Subsequently the respondent asked SP1 to come to the respondent's house where the respondent told SP1 not to settle the debt with SP6 and simultaneously gave SP1 RM2,000, which sum became the subject matter of the first charge herein. Later SP1 handed over the money to the ACA. In relation to the second charge, on 9 April 2001, SP1 was again invited to the respondent's home in the presence of four other persons, with one of them being Osmani. Osmani allegedly told SP1 not to settle the matter and that the respondent could give more money than SP6. That night the respondent gave SP1 RM5,000 which SP1 later handed over to the ACA. Upon the prevailing facts, the respondent was charged under s. 10(b)(aa) Anti-Corruption Act 1997 (the Act) with two counts of giving corrupt gratification on two separate occasions to SP1, in order to persuade him not to accept an offer of settlement from his bankrupted debtor, SP6. The learned Sessions Court judge convicted and sentenced the respondent on both charges. The respondent's appeal to the High Court was however successful, whereupon the prosecution appealed. The learned Sessions Court judge had found SP1's credibility to the unimpeachable, whereas the High Court judge painted him as an undiluted accomplice.

Held (allowing the appeal against the first charge only)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The testimonies of SP1, SP3 and SP10 showed that on 6 April 2001 the respondent had given RM2,000 to SP1 at his house, with it being corrupt payment. The direct evidence of the payment being corrupt in nature was in abundance. (para 13)

(2) Just because the respondent had given SP1 a bribe did not make SP1 an accomplice. SP1 had initiated nothing, whether in the form of contacting the respondent, or suggesting any proposal reciprocated by financial rewards. Everything pointed to the respondent making all the provocative moves to corrupt SP1. Section 44 of the Act also provides that no witness shall be regarded as an accomplice by reason only of such witness

having accepted, received, obtained, solicited, agreed to accept or receive or attempted to obtain any gratification from any person. (paras 15 & 16)

(3) By alerting the ACA before the commission of the offence, let alone he never detracted from the agency's instructions or swayed by the respondent's gratuitous attempt, up to the handing over of the money to the ACA, SP1 thus could not be labelled as an accomplice. Not being an accomplice there was thus no requirement for corroboration. (para 19)

(4) The respondent's defence was a mere denial of the whole episode of 6 April 2001. From the totality of the evidence, the prosecution had successfully established a case beyond reasonable doubt against the respondent on the first charge. (paras 22 & 23)

(5) Although the prosecution has the complete discretion whether to call a particular witness or not, there are situations where the prosecution must call certain witnesses or otherwise an adverse inference may be taken against it for that failure. The non-calling of Osmani had worked against its interest as he was present when the alleged handing over of the RM5,000 took place. Therefore it was unsafe to allow the appeal on the second charge as the prosecution had not established a *prima facie* case at the end of the prosecution's case. (para 25)

Obiter:

(1) Even if SP1 was an accomplice, under s. 133 of the Evidence Act 1950, an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Responden dalam kes ini dituduh dengan dua kesalahan rasuah di bawah peruntukan Akta Pencegahan Rasuah 1997 ('Akta'). Faktanya adalah, pada 5 April 2001 SP1 memperoleh satu perintah kebankrapan terhadap SP6 ekoran kegagalan SP6 membayar baki hutang berjumlah RM90,000. Pada 6 April 2001, SP1 dan SP6 telah pergi ke pejabat Pegawai Pemegang Harta ('PPH') untuk

A menyelesaikan halperkara yang berakhir dengan jumlah hutang diturunkan kepada RM20,000. Sementara perundingan dengan SP6 berjalan di pejabat PPH, SP1 menerima panggilan telefon secara berasingan dari SP3 and SP10 meminta supaya SP1 tidak menyelesaikan halperkara dengan SP6, dan supaya SP1 berjumpa
B dengan responden. Akibat dari ketiadaan penyelesaian itu adalah bahawa SP6 akan terus menjadi orang bankrap, dan itu akan menghalangnya dari bertanding dalam pemilihan jawatan Ketua Bahagian UMNO, Tapah, di mana responden adalah satu-satunya pesaing lain dalam pertandingan tersebut. Apapun, SP1 menjawab
C bahawa beliau akan berfikir mengenainya. SP1 kemudian menyedari bahawa wujud langkah-langkah untuk merasuahnya dan dengan itu telah menghubungi pihak Badan Pencegah Rasuah ('BPR'). Apapun, berikutnya, responden meminta supaya SP1 datang ke rumah responden dan di situ responden memberitahu SP1 untuk tidak
D menyelesaikan hutang dengan SP6 dan memberi kepada SP1 RM2,000. Pemberian RM2,000 ini menjadi teras kepada pertuduhan pertama di sini. SP1 kemudian menyerahkan wang tersebut kepada ACA. Berhubung dengan pertuduhan kedua, pada 9 April 2001, SP1 telah sekali lagi dijemput ke rumah responden dengan
E kehadiran empat orang lain, termasuk seorang Osmani. Di situ Osmani dikatakan memberitahu SP1 supaya tidak menyelesaikan halperkara hutang dengan SP6 dan bahawa responden boleh memberi lebih banyak duit kepadanya berbanding apa yang diberi SP6. Pada malam tersebut responden telah memberi SP1 sebanyak
F RM5,000, yang mana telah juga diserahkan oleh SP1 kepada BPR. Responden kemudian dituduh atas dua kesalahan berasingan kerana memberi habuan secara rasuah kepada SP1 di bawah s. 10(b)(aa) Anti-Corruption Act 1997 ('Akta'), iaitu untuk memujuknya dari menerima tawaran penyelesaian dari penghutangnya, SP6. Yang arif
G hakim Mahkamah Sesyen telah mensabitkan kesalahan dan menjatuhkan hukuman ke atas responden atas kedua-dua kesalahan. Rayuan responden ke Mahkamah Tinggi bagaimanapun telah berjaya dan pendakwaan telah merayu. Fakta menunjukkan bahawa yang arif hakim Mahkamah Sesyen mendapati kredibiliti SP1 tidak boleh
H dicabar, sementara yang arif hakim Mahkamah Tinggi pula mengecap SP1 sebagai rakan jenayah tegar. .

I

Diputuskan (membenarkan rayuan tetapi hanya terhadap pertuduhan pertama)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Testimoni SP1, SP3 dan SP10 menunjukkan bahawa pada 6 April 2001 responden telah memberi RM2,000 kepada SP1 di rumahnya, yang mana itu jelas satu bayaran rasuah. Wujud keterangan terus yang banyak yang menunjukkan bayaran tersebut adalah satu bayaran bersifat rasuah.

(2) Cuma kerana responden memberikan rasuah kepada SP1 tidak menjadikan SP1 seorang rakan sejenayah. SP1 tidak mengambil apa-apa initiatif, sama ada dengan menghubungi responden, atau memberikan apa-apa cadangan yang dibalasi dengan habuan kewangan. Semuanya menunjuk kepada responden sebagai orang yang membuat segala gerakan-gerakan provokatif untuk merasuah SP1. Seksyen 44 Akta juga memperuntukkan bahawa tiada saksi harus dianggap sebagai rakan sejenayah cuma disebabkan saksi tersebut telah menerima, mendapat, meminta, bersetuju untuk menerima atau cuba untuk mendapatkan sebarang habuan dari seseorang.

(3) Dengan beliau pergi kepada BPR sebelum kesalahan dilakukan, sementelah beliau tidak pernah mengingkari arahan-arahan BPR atau terpengaruh dengan percubaan-percubaan responden untuk menyogoknya, dan mengambilkira juga tindakannya menyerahkan semua wang kepada BPR, semua ini menunjukkan bahawa SP1 tidak boleh dianggap sebagai seorang rakan sejenayah. Dengan SP1 bukan seorang rakan sejenayah, maka keperluan keterangan sokongan sudah tidak berbangkit.

(4) Pembelaan responden hanyalah penafian semata-mata akan episod yang berlaku pada 6 April 2001. Dari keseluruhan keterangan, pendakwaan telah berjaya membuktikan suatu kes di luar keraguan munasabah terhadap responden atas pertuduhan pertama.

(5) Walaupun pendakwaan mempunyai budibicara sepenuhnya sama ada untuk memanggil seseorang saksi atau pun tidak, terdapat keadaan di mana pendakwaan wajib memanggil seseorang saksi jika tidak mahu inferens bertentangan dibangkitkan terhadapnya atas kegagalannya itu. Dalam kes ini, kegagalan memanggil

A Osmani telah menjejaskan kes pendakwaan oleh kerana beliau hadir sewaktu wang RM5,000 tersebut didakwa diserahkan kepada SP1. Oleh itu, adalah tidak selamat untuk membenarkan rayuan terhadap pertuduhan kedua memandangkan pendakwaan telah gagal membuktikan kes *prima facie* di akhir kesnya.

B ***Obiter:***

(1) Jikapun SP1 seorang rakan sejenayah, di bawah s. 133 Akta Keterangan 1950, seorang rakan sejenayah masih boleh menjadi seorang saksi yang kompeten terhadap seseorang tertuduh; dan
C suatu sabitan tidak menjadi tak sah cuma kerana ianya dilandaskan kepada testimoni tanpa sokongan seorang rakan sejenayah.

Case(s) referred to:

D *Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC* ***(refd)***
Adel Muhammaed el Dabbah v. AG of Palestine [1944] AC 156 ***(refd)***
Ng Kok Lian & Anor v. PP [1983] 2 CLJ 247; [1983] CLJ (Rep) 293 FC ***(refd)***
E *PP v. Ling Tee Huah [1980] 1 LNS 212 HC* ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 4 CLJ 460 FC ***(refd)***
R v. Ready & Manning [1942] VLR 85 CCA ***(refd)***
Sathasivam and Two Ors v. PP [1948] 1 LNS 61 ***(refd)***
Seneviratne v. R [1936] 3 All ER 36 ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***
F *Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC* ***(refd)***

Legislation referred to:

Anti-Corruption Act 1997, ss. 10(b)(aa), 42(1), 44(2)
Criminal Procedure Code, s. 180
Evidence Act 1950, s. 133

G

For the appellant - Saiful Edris Zainuddin; DPP
For the respondent - Dato' Sri Muhammad Shafee Abdullah (Badrul Munir Bukhari with him); M/s Shafee & Co

Reported by Amutha Suppayah

H

I

JUDGMENT

Suriyadi Halim Omar JCA:

[1] At the Sessions Court the respondent was charged with two counts of giving gratification under s. 10(b)(aa) Akta Pencegahan Rasuah 1997 (the Act), with the charges reading as follows:

> 1st charge:
>
> Bahawa kamu pada 6 April 2001, jam lebih kurang di antara 6.00 hingga 7.00 petang, di rumah No. 29, Lengkok Pasar, Rapat Setia, Ipoh, di dalam Daerah Kinta, di dalam negeri Perak, secara rasuah telah memberi suapan iaitu, wang tunai sebanyak RM2,000.00 kepada Mohd Kamal bin Rabaai, sebagai dorongan untuk Mohd Kamal bin Rabaai supaya tidak menerima tawaran penyelesaian daripada Pazli bin Abdullah Sani, yang telah dihukum muflis akibat tuntutan hutang ke atasnya oleh Mohd Kamal bin Rabaai agar Pazli bin Abdullah Sani akan kekal muflis dan tidak layak bertanding menentang kamu bagi jawatan Ketua UMNO bahagian Tapah pada 22 April 2001 dan dengan demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 10(b)(aa) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) dan boleh dihukum di bawah seksyen 16 Akta yang sama.
>
> The 2nd charge:
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> Bahawa kamu pada 9 April 2001, jam lebih kurang di antara 8.30 hingga 11.00 malam, di rumah No. 29, Lengkok Pasar, Rapat Setia, Ipoh, di dalam Daerah Kinta, di dalam negeri Perak, secara rasuah telah memberi suapan iaitu, wang tunai sebanyak RM5,000.00 kepada Mohd Kamal bin Rabaai, sebagai dorongan untuk Mohd Kamal bin Rabaai supaya tidak menerima tawaran penyelesaian daripada Pazli bin Abdullah Sani, yang telah dihukum muflis akibat tuntutan hutang ke atasnya oleh Mohd Kamal bin Rabaai agar Pazli bin Abdullah Sani akan kekal muflis dan tidak layak bertanding menentang kamu bagi jawatan Ketua UMNO bahagian Tapah pada 22 April 2001 dan dengan demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 10(b)(aa) Akta Pencegahan Rasuah 1997 (Undang-Undang Malaysia Akta 575) dan boleh dihukum di bawah seksyen 16 Akta yang sama.

[2] Section 10(b)(aa) reads thus:

A 10. Any person who by himself, or by or in conjunction with any other person:

(a) …

(b) **corruptly** gives, promises or offers to any person whether for the benefit of that person or of another person,

B

any gratification as an inducement to or a reward for, or otherwise on account of:

(aa) any person doing or **forbearing** to do **anything** in respect of any matter or transaction, actual or proposed or likely

C to take place; or

(bb) …

shall be guilty of an offence (emphasis added for this appeal).

D **[3]** In a gist, the respondent faced two charges of giving corrupt gratification on two separate occasions to SP1, in order to persuade him not to accept an offer of settlement from his bankrupted debtor ie, SP6. Without that settlement SP6, would remain a bankrupt, hence disabling him from standing for election as head of the Tapah UMNO branch on 22 April 2001. From facts that surfaced,

E the respondent was to be the other serious contender for the same post. At the end of the hearing before the learned Sessions Court judge, the respondent was found guilty, convicted, and accordingly sentenced for the two charges. Being dissatisfied, the respondent appealed to the High Court and was successful whereupon both

F convictions and sentences were set aside. The prosecution then filed the necessary notices of appeal to this court against the acquittal and discharge of both the charges. After hearing the appeal, we only set aside the High Court's order as regards the first charge. We reinstated the finding of guilt, conviction, and sentence of two years

G jail and a fine of RM10,000 in default six months jail.

[4] The prosecution's case depended very much on the testimony of its witnesses especially of SP1, SP3, and SP10, and after discussing them, the learned Sessions Court judge concluded that

H SP1 and SP3 were not accomplices. He held that s. 44 of the Act was applicable. This provision reads:

Evidence of accomplice and agent provocateur

44(1) Notwithstanding any written law or rule of law to the

I contrary, in any proceedings against any person for an offence under this Act:

(a) no witness shall be regarded as an accomplice by reason only of such witness having:

(i) accepted, received obtained, solicited, agreed to accept or receive or attempted to obtain any gratification from any person;

(ii) Give, promised, offered or agreed to give any gratification; or

(iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;

(b) no agent provocateur, whether he is an officer of the Agency or not, shall be presumed to be unworthy of credit by reason only of his having attempted to commit, or to abet, having abetted or having been engaged in an criminal conspiracy to commit, such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person; and

(c) any statement, whether oral or written, made to an agent provocateur by such person shall be admissible as evidence at his trial.

(2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of an accomplice or agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence.

[5] Apart from not labelling SP1 an accomplice, the learned Sessions Court judge also found his credibility unimpeachable. He was a witness who had no particular interest in this case and one who expected no financial gain. His reaction to inform the Anti-Corruption Agency (ACA) of the move to corrupt him and filing of a report merely confirmed his credibility. In terms of procedure, there was no necessity for him to lodge the report that very night.

[6] As regards SP3, the Sessions Court had concluded that the respondent had asked him to contact SP1 and request him not to settle the bankruptcy matter with SP6. As SP1 did not know the respondent or his residence, his role was to show the direction of the house and mutually introduce them. He was never involved in the handing over of the money to SP1 by the respondent. There was certainly a dearth of evidence to show that SP3 knew money was about to be handed over to SP1 that night of 6 April 2001.

[7] Before us, as at the Sessions Court and the High Court, the respondent canvassed that he was entitled to the acquittals, as there were many loopholes in the testimony of the prosecution's witnesses. The special target was SP1 whom the learned High Court judge painted as an undiluted accomplice, with his evidence peppered with inconsistencies, and his testimony requiring corroboration. He made specific findings of facts and rejected the Sessions Court judge's findings despite the Latter's vantage position.

[8] With the above scenario in mind, let us now scrutinize the evidence of these three relevant witnesses in more detail. SP1 is a contractor and had past business dealings with SP6, and due to non-payment of a balance of RM90,000 by the latter, SP1 on 5 April 2001 successfully obtained a bankruptcy order against him. The next day ie, 6 April 2001 SP1 and SP6 went to the Official Assignees' office (OA) to settle the matter, eventuating with the indebted sum reduced to RM20,000. While discussing with SP6 at the OA SP3 telephoned, requesting SP1 not to settle the matter with SP6, and to meet the respondent later. SP1 replied that he would think about it. After that telephone call SP1 received a call from SP10 communicating the same message. Like the earlier telephone call, he replied that he would think about the suggestion not to settle the matter.

[9] After receipt of those two telephone calls, he realized that there was a move to corrupt him. He then contacted the ACA. He also telephoned SP6 and told him of the two calls of SP3 and SP10. After Friday prayers, he and SP6 went to the ACA office and lodged a report (P4). At 4pm on the same day, the respondent contacted SP1 by telephone. The former asked him to come to his house, and told him to not to settle the debt with SP6. SP1 replied that he did not know the way to his house and the respondent replied that SP3 would contact him regarding the directions. Later SP3 telephoned him and by 6pm, they ended up at the respondent's house.

[10] At his house, the respondent entertained them. He then reiterated to SP1 not to settle the matter with SP6 and further said he could give more. The respondent then gave SP1 RM2,000 at that stage and the latter thereafter left. On the way out SP1 tore certain documents that emanated from the OA's office and thereafter

shoved them into his pocket. There was some dispute as to whether those documents were actually already with SP1 when at the respondent's house, or given by the respondent when he was on the way out. At late evening, still on 6 April 2001, he contacted the ACA and told the agency that he had just received RM2,000 from the respondent. SP1 was told to send the money and the torn documents to them the next day, and of which he did. On 7 April 2001, he handed over the money and the torn documents to the ACA.

[11] Before touching on the quality of SP1's evidence, let us peruse the evidence of SP3 and SP10 first. I begin with the testimony of SP3. This witness testified that the respondent had contacted him, requesting SP1 be contacted, and to extend an invitation to his house. He did contact SP1 and the latter told him to tell the respondent to call him back. Later SP1 called back telling SP3 that the respondent had contacted him whereupon they met at the Gopeng mosque. He admitted that in the afternoon of 6 April 2001, together with SP1, they went to the respondent's house, as SP1 did not know the way let alone knew the respondent at all. He admitted that perhaps those were the reasons why the respondent sought out his help. SP3 admitted that at the respondent's home, the respondent discussed with SP1, and there requested that no settlement take place between him and SP6. This fact of SP3 being at the respondent's house was never challenged, and there he heard the respondent say, "Jika boleh berunding dengan teman dulu". In the course of it RM2,000 was handed over to SP1. When handing the money, the respondent said "Ini yang mulanya." SP3 admitted not knowing the actual amount though he saw the handing over of the money. He also saw SP1 tearing certain documents in front of the respondent and shoving the torn documents into his pocket.

[12] I now touch on SP10's evidence who testified that he contacted SP1 in the morning of 6 April 2001. The purpose was to inform him of the respondent's instruction of not settling the bankruptcy matter with SP6 and that he could pay more. SP1 replied that politicians could not be believed. SP10 then informed the respondent that SP1 was not receptive. That was his only role in this case.

[13] From the testimonies of SP1, SP3 and SP10 this panel was satisfied that on 6 April 2001 between 6pm to 7pm the respondent had given RM2,000 to SP1 at his house, with it being corrupt payment. As under s. 2 of the Act 'gratification' includes money, no legal activism is needed here. Apart from the oral testimonies of those witnesses who testified that they were instructed to communicate certain nefarious instructions to SP1, or heard the requests of the respondent, and also saw the handing over of the gratification sum, there was no reason for the respondent to give away RM2,000 to someone whom he did not know. The hidden agenda of wanting to be the head of the UMNO division of Tapah must be the very basis of the gratification payment. In a nutshell the direct evidence of the payment being corrupt in nature, as adduced by the prosecution, was in abundance.

[14] Despite the availability of direct evidence, perhaps wanting to take the short route, the prosecution had invoked the statutory presumption as borne out under s. 42(1) of the Act. That is the prerogative of the prosecutor. By allusion to this evidential provision the RM2,000 payment thus was presumed to be a corrupt payment offered as an inducement as per the charges. For completeness, we supply the latter provision:

> **Presumption in certain offences**
>
> 42(1) Where in any proceedings against any person for an offence under section 10, 11, 13, 14 or 15 it is proved that any gratification has been accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

[15] As reflected from the above prognosis with the issue of whether the payment was 'corrupt' or not having been resolved the next issue for consideration is whether SP1 was an accomplice. In this case, the respondent had given SP1 a bribe. Does that automatically make SP1 an accomplice? We held the view that the answer has to be in the negative. SP1 had initiated nothing, whether in the form of contacting the respondent, or suggesting any

proposal reciprocated by financial rewards. In fact, everything pointed to the respondent making all the provocative moves to corrupt this witness.

[16] To add to the armoury of the prosecution, the above s. 44 of the Act succinctly provides that no witness shall be regarded as an accomplice by reason only of such witness having accepted, received obtained, solicited, agreed to accept or receive or attempted to obtain any gratification from any person. The court in *Ng Kok Lian & Anor v. Public Prosecutor* [1983] 2 CLJ 247; [1983] CLJ (Rep) 293 had occasion to say:

> *Goh Leng Sai*'s case clearly shows that there can be no *prima facie* inference that a witness is an accomplice just because a bribe is given to him …

[17] Further to that, SP1 never kept that RM2,000 as come the next day, as per instruction, the latter sum was handed over to the ACA. What is pertinent here is SP1's intention ie, whether he intended to appropriate the gratification for keeps and thus advertently acquiesce to the criminal intention of the respondent. In *R v. Ready & Manning* [1942] VLR 85 CCA Mann CJ had opined (p. 93):

> The only definition in the books of the word "accomplice" which counsel were able to cite to us was that pronounced by Denman J in *R v. Cramp* [1880] 14 Cox CC 390, who said that a witness would not be an accomplice unless she was privy to the criminal intent of the principal offender.

[18] Returning to the above s. 44, this provision covers quite a wide scenario but by the reading of it, taking without more of the payment, relieves him of being an accomplice. In the above case of *Ng Kok Lian & Anor v. Public Prosecutor (supra)*, the court remarked that, "… the mere taking of the money does not amount to a taking of a bribe if there is no intention to appropriate it as his property."

[19] To indicate further that he had no intention of appropriating the RM2,000 was his want of silence. Apart from reporting to the agency, SP1 also told SP6. This conduct in fact began very much earlier ie, when he told the ACA of his fears even before the commission of the offence at the respondent's house. By so alerting the ACA before the commission of the offence, let alone he never

detracted from the agency's instructions or was swayed by the respondent's gratuitous attempt, up to the handing over of the money to the ACA, he thus could not be labeled an accomplice (*Sathasivam and Two Ors v. PP* [1948] 1 LNS 61). Not being an accomplice there was thus no requirement for corroboration.

[20] Before us, the learned DPP had successfully pointed to us the relevant consistent testimony of SP1 and SP3, and we were in absolute agreement with the view of the learned Sessions Court judge that the credibility of the prosecution's witnesses had remained steadfast and unimpeached. What if SP1 were an accomplice (of which we are saying no)? Under s. 133 of the Evidence Act 1950 (apart from s. 44(2) of the Act), an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. As this provision is clear, and ascertainable this court must yield to the intention of Parliament. In *Public Prosecutor v. Tan Tatt Eek* [2005] 4 CLJ 460 Steve Shim CJ (Sabah & Sarawak) *inter alia* said:

> … The court then cited with approval the observation by Lord Simonds in *Magor & St. Mellons Rural District Council v. Newport Corporation* [1952] AC 189 HL wherein he said that the duty of the court was to interpret the words of a statute that the legislature had used. It is of course trite law that if the intention of the legislature is expressed in words which are clear and explicit, the court must give expression to that intention. As *Bindra's Interpretation of Statutes*, 8th edn, has stated:
>
> If the intention of the Legislature can be ascertained all rules of construction must yield to the Legislative intention (*Board of Trustees v. Johan Steele* [1933] SCC (SC) 47). They cannot override the legislative intent specifically expressed in the enactment (*State of Up v. Jaipal Singh Narsh* [1978] All L1 936). If the intention of the Legislature is clear, that intention constitutes the law.
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> The primary duty of the court is to give effect to the intention of the legislature in the words used by it. It is a well established canon of interpretation that the intent of the legislature is to be gathered from the words used and that if the words used have not acquired any technical meaning, they should be deemed to have been used in their ordinary meaning. If the words of the statute are in themselves precise and unambiguous, then no more is necessary

than to expound those words in their natural and ordinary sense. The words themselves alone in such case best declare the intent of the law giver. (see *Bindra's Interpretation of Statues* 8th edn) …

[21] Since an accomplice is a competent witness and regardless of SP1's status, due to the abundance of evidence to substantiate his evidence regarding the gratification payment, we were satisfied that the prosecution had successfully established a *prima facie* case for the first charge. The issue of whether the torn documents, as mentioned earlier, were already with SP1 prior to going to the respondent's house, or given by the latter on the way out, was so inconsequential that it could do little to whittle away the prosecution's case. What was undeniable was that even SP3 and the ACA officer confirmed their existence.

[22] The respondent's defence was mere denial of the whole episode of 6 April 2001. At p. 178 in his oral testimony he testified, "Pada pertemuan pertama 6 April 2001 saya tak pernah membuat apa apa tawaran kepada Kamal (SP1-ours). Pada tarikh yang sama saya tidak pernah memberi apa-apa wang kepada Kamal." In D28 (p. 303 of the rekod rayuan of his cautioned statement) he said:

(Dato' Azman bin Mahalan merujuk kepada cetakan diarinya pada 6.4.2001)

16.Mengikut catatan diari saya, pada petang jam 2.30 saya berada di Parit, Perak kerana menghadiri lawatan YAB Perdana Menteri. Selepas itu saya balik dan sampai di rumah lebih kurang pukul 7.00 malam. Selepas Maghrib saya pergi ke Dewan 'Banquet' di Bangunan Perak Darul Ridzuan. Saya balik ke rumah pada 12.30 tengah malam. Saya tak pasti samada antara jam 7.00 malam, sebelum saya ke Dewan Banquet, itulah masanya kemungkinan Kamal dan Shaiduddin datang ke rumah sepertimana yang saya katakan tadi, iaitu kunjungan pertama En. Kamal. Dalam pertemuan itu, kalau tidak silap saya dia (Kamal) ada tunjukkan dokumen mengatakan Padzil cuba main-mainkan dia. Saya kurang pasti kandungan dokumen itu, tetapi Kamal amat marah ketika itu dan mengoyakkannya dua kali. **Saya tidak memberi apa-apa wang kepada Kamal sebab dia balik dan tidak meminta apa-apa bantuan daripada saya.**

[23] This panel was unconvinced by the above mere denials, and without any other proof to reasonably dislodge the prosecutions' case, the respondent was in trouble (*Public Prosecutor v. Ling Tee Huah* [1980] 1 LNS 212). The upshot was that we were satisfied from the totality of the evidence that the respondent had failed to rebut the prosecution's case (*Thavanathan Balasubramaniam v. Public Prosecutor* [1997] 3 CLJ 150; *Pendakwa Raya v. Md Nor* (MT Melaka RJ(1) 42-5002)). We therefore were satisfied that at the end of the defence case, the prosecution had successfully established a case beyond reasonable doubt against the respondent for the first charge hence our affirmation of the decision of the Sessions Court judge for it. We also later meted down the same sentence, as it was suitable and appropriate in the circumstances of the case.

[24] I now touch on the incident that relates to the second charge. On 9 April 2001, the respondent had called SP1 after mid-day. The same instruction was uttered to him ie, not to settle the matter. After that telephone call, SP1 immediately called the agency. At Hotel Seri Malaysia, an ACA officer gave him certain instructions in the event the respondent was to call him again. After the Asar prayers he received a 'missed call' from the respondent. SP1 called the respondent and the latter requested him to go to his house again at about 8pm. Later he received another call requesting him to change the time to 8.30pm. After this call, he contacted the ACA. The agency again gave him certain specific instructions regarding the course of action to be undertaken. He then went to the respondent's home alone. Before proceeding to the respondent's house, the ACA checked his car and frisked him for any hidden money. It found none. He arrived at the respondent's home at 8.30pm. Later four persons came, with one of them being Osmani, who likewise told him not to settle the matter. He also stated that the respondent could give more money than SP6. The respondent merely nodded his head. That night the respondent gave SP1 RM5,000. After leaving that house he went straight to Hotel Seri Malaysia and met an ACA officer ie, one Mohammad bin Hassan whereupon he handed him that RM5,000.

[25] It is trite that the prosecution has the complete discretion whether to call a particular witness or not (*Adel Muhammaed el Dabbah v. A.G of Palestine* [1944] AC 156). Yet there are situations where the prosecution must call certain witnesses or otherwise an

adverse inference may be taken against it for that failure (*Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; *Seneviratne v. R* [1936] 3 All ER 36; *Abdullah Zawawi Omar v. Public Prosecutor* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19). We held the view here that the non-calling of Osmani had worked against its interest as he was present when the alleged handing over of the RM5,000 took place. The panel therefore held that it was unsafe to allow the appeal on the second charge, as to begin with, we were not convinced that the prosecution had established a *prima facie* case at the end of the prosecution's case (s. 180 of the CPC).

[26] To summarise the outcome of the appeal, this panel allowed the appeal only as regards the first charge. The High Court order in respect of the first charge was thus set aside. The Sessions Court's decision of conviction pertaining to the first charge was reinstated and affirmed. The respondent was sentenced to two years of imprisonment with immediate effect and a fine of RM2,000, and in default of which he would undergo another six months jail.